**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF WISCONSIN**
**GREEN BAY DIVISION**

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| UNITED STATES OF AMERICA and THE STATE OF WISCONSIN,<br><br>Plaintiffs,<br><br>v.<br><br>NCR CORPORATION, *et al.*,<br><br>Defendants. | Civil Action No. 10-C-910<br><br>The Honorable William C. Griesbach |

**UNITED STATES' COMBINED RESPONSE TO PROPOSED JUDGMENT SUBMITTED BY NCR CORPORATION AND BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

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Important cases should not be decided based on surprises unveiled on the last day of trial. That is especially true when the surprises come from previously-undisclosed and largely unexplained expert opinions. Mr. Butler's "28 percent share" estimate for NCR was not presented or explained in any expert report that he prepared or that NCR provided, contrary to the requirements of the Federal Rules of Civil Procedure.[1] In addition, Butler's "28 percent share" proclamation violated the reliability requirements for expert evidence; to this day, the Court and NCR's litigation opponents do not know and cannot discern the facts and figures that Butler used to compute a "28 percent share" for NCR because Butler did not disclose any details of his calculations during his roughly eight minutes of testimony on that "share" assessment. Tr. 2784-88 (Butler).[2]

Although we know that Butler borrowed at least some questionable estimates from Dr. Wolfe, Butler also changed the way that he used Wolfe's data at the eleventh hour and he made completely new and undisclosed calculations to derive the "28 percent share" assessment

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[1] To comply with the Rules, a litigant must submit a written report prepared by the expert witness that contains, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii). This requirement ensures that the opposing party has an adequate basis to examine the expert. Fed R. Civ. P. 26 advisory committee's note. In addition, Fed. R. Civ. P. 37(c)(1) specifies that "[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence." "This sanction is automatic and mandatory unless the party can show the violation was either justified or harmless." *Miskis v. Howard*, 106 F.3d 754, 760 (7th Cir. 1997) (internal quotations omitted) (affirming exclusion of proposed expert opinions that were not disclosed until three days before trial).

[2] *See General Electric. Corp. v. Joyner*, 522 U.S. 136 (1997) ("nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process . . . for the judge must 'look behind [the expert's] ultimate conclusion . . . and analyze the adequacy of its foundation . . . .' Judges should not be buffaloed by unreasoned expert opinions.") (Easterbrook, J., quoting *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988)); *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999).

that he offered on the last day of trial. And to this day, we have no idea how Butler performed his calculations because *there is no record evidence of any Wolfe estimates of PCB mass percentage contributions to "OU4A" from the dischargers located in OU1 or "OU4A."* In its recent decision, this Court seems to have relied on a misconception that the record contains a complete set of PCB mass contribution "best estimates" from Wolfe for all of OU4.

From what little we can tell after further reconstruction, Butler seems to have concluded that NCR on its own necessitated a remedy costing *about $435 million*, or *more than 69% of the $629 million total remedy cost estimated by NCR*, as shown below. But we know nothing about the "stand-alone remedies" or "stand-alone costs" that Butler somehow projected for the other parties. The "stand-alone cost" estimates for the other parties would have mattered greatly because Butler *needed* to use them to compute NCR's "28 percent share" under his "stand-alone cost ratio method." Simply stated, the trial record offers no foundational support for the "28 percent share" opinion that Butler presented on the last day of trial.[3]

The United States and other parties objected to Butler's improper surrebuttal testimony at the time, but the Court overruled the objections.[4] At that point, no one could fully appreciate all the issues posed by Butler's partially-disclosed behind-the-scenes work in the waning days of trial. The court of appeals knew none of this when it remanded the matter for further fact finding about whether "Dr. Wolfe's mass-percentage estimates were unreliable" and whether "Butler's use of those estimates was unsound." *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 678

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[3] "At all times, the burden remains on the party seeking apportionment – here NCR – to 'prove[] that a reasonable basis for apportionment exists." *United States v. NCR Corp.*, 688 F.3d 833, 838 (7th Cir. 2012) (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009)). If NCR failed to build a complete record to support an apportionment theory based on Wolfe's PCB contribution estimates and Butler's apportionment approach, then NCR failed to carry its burden and the United States deserves entry of a joint and several liability judgment against NCR.

[4] We hereby reiterate, renew, and preserve our objection that Butler's "28 percent share" opinion never should have been allowed at trial – or should have been stricken or discounted completely – under the authorities referenced in the preceding footnotes, including Fed. R. Civ. P. 26(a)(2)(A) and 37(c)(1) and the Federal Rules of Evidence and case law governing admission of expert evidence.

(7th Cir. 2014). The Court should reconsider and reverse its May 15 decision for the reasons outlined here. With all due respect, we submit that the Court in its recent decision:

- May not have appreciated the gaps in the record and lack of foundational support for Butler's "28 percent share" conclusion;
- Went too far in discounting the acknowledged and serious uncertainties surrounding the incomplete set of PCB mass contribution estimates that Wolfe offered;
- Overlooked the fact that errors in the PCB concentrations calculated by Butler mattered greatly and would not "balance out" because of the way Butler performed his actual apportionment;
- Seriously misconstrued the Seventh Circuit's remand guidance about an apportionment based on remediation costs necessitated by each party and mistakenly assumed that "if NCR contributed to 27-43% of the harm in OU4, it also contributed roughly the same amount to the cleanup cost" (Dkt. 1000 at 15); and
- Wrongly accepted a "share" devised with a cost-sharing method that is fundamentally unsuitable for apportionment purposes.

Any one of these errors would justify reconsideration and a reversal.

Section A of this brief highlights errors and oversights in the Court's decision finding the harm theoretically capable of apportionment. Section B shows that the trial record does not establish a reasonable basis for apportioning NCR a "28 percent share" of the OU4 remediation costs. Finally, Section C identifies specific problems with the proposed form of judgment that NCR submitted on May 22, 2015 (Dkt. 1002-1).

**A. The Court Erred in Finding the Harm Theoretically Capable of Apportionment**

The Court mistakenly found that the United States' prior submissions "addressed only the apportionment question" and not "theoretical divisibility." Dkt. 1000 at 5. In those submissions, we acknowledged the Seventh Circuit's indication that "we think the harm would be theoretically capable of apportionment if NCR could show the extent to which it contributed to PCB concentrations in OU4." *Glatfelter*, 768 F.3d at 678. The court of appeals recognized that Butler attempted to do that for NCR when he took mass percentage estimates from Simon, Connolly, and Wolfe "and multiplied them by the actual concentrations of PCBs in OU4, which

he obtained from a database of core samples, to determine the concentrations of PCBs attributable to each party." *Id.* The trial record and our prior submissions to this Court demonstrate that NCR failed to prove the harm theoretically capable of apportionment because: (i) Wolfe's mass percentage estimates were unreliable; and (ii) in any event, Butler used an unsound method to try to translate PCB mass percentage estimates into assumed contributions to the PCB concentrations in OU4. *See* Dkt. 980 at 13-21. Each point is addressed again below.

**1. The Court erred in finding Dr. Wolfe's mass percentage estimates reliable.**

At trial, Dr. Wolfe never provided an affirmative opinion regarding PCB mass contributions to OU4 from NCR or any other entity. To the contrary, he opined that "the challenge of using a modeling approach to answer this question [divisibility] is too great." Tr. 2225-26 (Wolfe). Wolfe provided limited testimony on his hindcast modeling analysis, generated for a 2006 settlement mediation, and did so for the sole purpose of illustrating the extreme variability among the different modeled PCB contributions to OU4B – his, Simon's, and Connolly's – to show the difficulty in generating reliable estimates of such contributions. Tr. 2225 (Wolfe). As discussed below, Wolfe's testimony provided an incomplete analysis of the different defendants' PCB contributions to OU4 and acknowledged the significant uncertainty regarding both the inputs to his model and the model itself. His conclusion, stated repeatedly at trial, was that none of the models – including his own – was sufficiently reliable to support apportionment. And that conclusion remains as applicable following the Seventh Circuit's decision as before.

**a. Dr. Wolfe's estimates were incomplete.**

As an initial matter, Wolfe's OU4 PCB contribution estimates are an insufficient basis for apportionment because they are simply incomplete. Wolfe's expert report only provided PCB

mass contribution estimates for each contributor to OU4B. TX 9980.[5] While he confirmed on cross-examination that his 2006 estimate of NCR's contribution to OU4A had been 43%, he could not recall what percentage of the PCBs now present in OU4A came from the OU1 Parties or OU4A Parties. Tr. 2266-67 (Wolfe). There is simply nothing in evidence setting forth Wolfe's estimates as to the OU1 and OU4A Parties' contributions of PCBs to OU4A. As discussed in detail below, this lack of evidence makes it unclear how Butler could conduct a "stand-alone cost" analysis using Wolfe's estimates – as the evidentiary record contains no Wolfe PCB contribution estimates for OU4A for any entity other than NCR.

**b. Wolfe's testimony that his modeling was unreliable should be given appropriate weight.**

As to the partial estimates generated by his model, Wolfe repeatedly and consistently testified to the inadequacy of his model – as well as Simon's model – for use in an apportionment analysis. Application of the Seventh Circuit's divisibility standard does not alter this conclusion. This Court has stated that following the court of appeals' decision, "it would [now] be enough if Wolfe were able to provide reasonable estimates as to how much of NCR's discharges contributed to the contamination in OU4." Dkt. 1000 at 8. But the Court also clarified that this is not limited to simply identifying each party's initial PCB loadings. Rather, one must show "how much of each party's release stayed in OU4. This requires evidence about the numerous factors that cause particles to embed in the bottom of a river." Dkt. 1000 at 6, n.2.

Thus, to establish theoretical divisibility, NCR must show how much of its PCB releases stayed in OU4 – contributing to the harm there – as opposed to settling out prior to reaching OU4 or flowing through that portion of the river and entering the bay. As such, the concerns raised by Wolfe regarding the accuracy of his model remain applicable. And Wolfe acknowledged

[5] Even as to OU4B, Dr. Wolfe only provided grouped estimates for the OU1 Parties (17%), the OU2 Parties (27%), the OU4A Parties (21%), and the OU4B Parties (35%), and did not provide PCB contribution estimates for individual dischargers. TX 9980.

multiple uncertainties impacting the reliability of where his model would place PCBs discharged from particular facilities: assumptions such as the choice of an organic carbon partition coefficient, sediment deposition rate, and sediment resuspension rate (Tr. 2243-44 (Wolfe)); uncertainty as to timing, scope, and location of dredging activities (Tr. 2242-43 (Wolfe)); and the lack of historic data with which to calibrate the modeled PCB movements (Tr. 2197, 2221(Wolfe)). These uncertainties impact not only where PCBs came to rest within OU4, but determine whether they settled in OU4 at all.

The Court's assumption that Wolfe's testimony regarding the insufficiency of his PCB mass contribution percentages as a basis for divisibility would change in light of the Seventh Circuit's decision is unsupported by Wolfe's own testimony. At no point did Wolfe state that his concerns regarding the accuracy of the PCB mass contribution percentages were tied to identification of remedial clean-up costs associated with such PCBs. The Court stated that:

> Dr. Wolfe's ultimate conclusion that the harm was not divisible also rests on the assumption that the harm was binary in nature and that, with a remedial action level of only 1.0 ppm, the remedy would be approximately the same even if NCR was the only discharger. (ECF No. 729 at 2188-89).

Dkt. 1000 at 6. But with due respect, this conclusion is not reflected in the record and it conflates two separate portions of Wolfe's testimony. The cited testimony relates to Wolfe's *qualitative* opinion that upstream loads alone would have required approximately the full OU4 remedy, but has no relationship to his *quantitative* modeling efforts. *See* Tr. 2185-89 (Wolfe). The qualitative nature of the cited testimony was further amplified when NCR's counsel cross-examined Wolfe and elicited testimony that in formulating that opinion he had not even tried to conduct a "stand-alone cost" analysis similar to Butler's. Tr. 2255-56 (Wolfe).

This is wholly separate from Wolfe's opinion that the modeling efforts could not support divisibility, an opinion based on his conclusion that "there's a high degree of uncertainty in quantifying the movement, especially of PCBs from any particular facility to any particular

location in the river." Tr. 2196 (Wolfe). According to Wolfe, such uncertainty makes it "impossible" to determine where OU4's PCBs came from, so none of the Fox River modeling efforts constituted a "reliable scientific method" for dividing or apportioning the resulting harm to the Fox River. Tr. 2198 (Wolfe). Wolfe testified that the Court could not rely upon any of the modeled estimates – his, Simon's, or Connolly's – to determine the defendants' relative contributions to the PCBs found in the sediment today "because the uncertainty is so great, that the challenge of using a modeling approach to answer this question is too great." Tr. 2225-26 (Wolfe).

Wolfe's uncertainty was not limited to trying to identify PCB sources on a polygon-by-polygon basis – a task he never sought to perform – but on an operable unit basis. There is simply nothing in the record to support the Court's assumption that "only the most basic modeling would be required to establish how much PCB remained in OU4." *See* Dkt. 1000 at 15. PCB inputs still need to be determined and the movement of those PCBs modeled to estimate to what extent they reached OU4, remained there, or passed through. Wolfe's opinion that his model was insufficient to reliably identify the sources of the PCBs in OU4 remains equally relevant following the decision of the court of appeals and should not be disregarded.

**c. Wolfe's inputs were as unreliable as the Simon Team's.**

In its May 15 decision, the Court recognized the importance of utilizing appropriate inputs in evaluating the reliability of model-derived PCB mass contribution estimates, stating:

> In rejecting NCR's modeling experts' conclusions . . . my analysis was driven primarily by the unreliability of the *inputs* to their framework, most particularly the lowball assumptions about PCB discharges . . . .

Dkt. 1000 at 7-8 (emphasis in original). However, Wolfe's model inputs were no more reliable – and indeed reflected more guesswork – than those used by NCR's experts, the Simon Team. As with the Simon Team, Wolfe's unreliable inputs for PCB discharges from the various facilities

likewise renders his PCB contribution estimates insufficiently reliable for divisibility and apportionment purposes.

As a "hindcast," Wolfe's model applied estimated historical inputs to generate a result that tried to match then-current conditions when the model was built. At trial, Wolfe testified that uncertainty regarding PCB loadings was a primary basis for his belief that none of the models were sufficiently reliable to be used for apportionment. He stated that the "ideal situation is to actually know what [the PCB] loads are when you're building a model so that there's no uncertainty on that end." Tr. 2220 (Wolfe). He said the Fox River, however, "is an extreme case of the loads that came into the system being highly uncertain." *Id.*

Contrary to the Court's assertion that Wolfe had "relative confidence in the load estimates he reached" (Dkt. 1000 at 12), Wolfe actually testified that "[n]o one really knows how much PCB was loaded at each facility, and the records from that time and the inferences from those records are so uncertain that we just don't know." Tr. 2196 (Wolfe). And in fact, he acknowledged that "estimating the loads was really a kind of trial and error process." Tr. 2223 (Wolfe).

In attempting to generate a hindcast, Wolfe initially used the PCB loading estimates from WDNR's Tech Memo 2d, prepared in 1998. Tr. 2223, 2289 (Wolfe). When applied to his model, however, the WDNR load estimates "were too high," producing PCB concentrations in the river far in excess of what the actual data showed. The inconsistency between the modeled results and the actual data meant that either there was an error in the inputs or in how the model manipulated those inputs. Wolfe testified that he chose to address this inconsistency by altering the WDNR inputs and that "by trial and error we reduced each plant's load individually until the model output really matched all the data in the water column and each of the [PCB] inventories in each OU." Tr. 2223 (Wolfe).

In other words, Wolfe's hindcast model failed to generate outputs consistent with the known PCB inventory data until he reduced WDNR's estimated PCB loadings for the different facilities and reduced them significantly. Specifically, Wolfe needed to cut the OU1 Parties' PCB loads by 77.5% for his model to place the right amount of PCBs into OU4. TX 2206 at FOXEXPT004727; Tr. 2288-89 (Wolfe). He reduced Georgia-Pacific's PCB loads by 40%. TX 2206 at FOXEXPT004727. And he reduced NCR's PCB loads by 73.5% – a modification on par with the Simon Team's 78% reduction of NCR's PCB loads deemed unreliable by this Court.[6] As for U.S. Paper, Wolfe couldn't use the WDNR estimates at all, as new information identified after Tech Memo 2d was issued suggested that U.S. Paper might be a significantly greater source of PCB loadings than initially thought. TX 2206 at FOXEXPT004727.

How different entities estimated Glatfelter's PCB loadings illustrates why there is little reason to believe Wolfe's inputs were any more reliable than the Simon Team's. WDNR had estimated Glatfelter's PCB loadings at 163,226 lbs., a figure consistent with NCR's independently generated estimate for Glatfelter of 168,763 lbs. Tr. 765 (Braithwaite). To make his model work, however, Wolfe chose to reduce Glatfelter contribution by almost 130,000 lbs. to only 36,726 lbs., a figure which almost matches Glatfelter's own estimate of 30,865 lbs.[7] – an estimate that was exposed as unsupportable on cross-examination and rejected by this Court. *See United States v. NCR Corp.*, 960 F. Supp.2d 793, 831 (E.D. Wis. 2013).

Unreliable inputs produce unreliable results. To his credit, Wolfe was fully cognizant of the limitations of the inputs he used in creating his hindcast and testified that he "never intended to put it forth as precise estimates to be used for an apportionment process." Tr. 2224 (Wolfe).

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[6] The Simon Team had also started with an objective estimate of the PCB loadings – a report by Amendola Engineering – and then made reductions. Tr. at 758 (Braithwaite).

[7] Glatfelter's expert, Victor Magar, testified that Glatfelter had discharged 14,000 kg of PCBs into the River (Tr. 1651 (Magar)), a figure which converts to 30,865 lbs.

Nothing in the court of appeals' decision strengthens the reliability of such inputs. And Wolfe's work remains insufficient to support a "theoretical divisibility" determination or any apportionment by Butler.

**d. Dr. Wolfe's role as a witness adverse to NCR does not render otherwise unreliable estimates reliable.**

Finally, the Court placed undue weight on the fact that Dr. Wolfe was presented by Georgia-Pacific, a party adverse to NCR, in considering the reliability of his estimate of NCR's contribution of PCBs to OU4. NCR had the burden to establish its divisibility defense and the United States and the other defendants were not obliged to attempt to calculate NCR's percentage contribution of PCBs to OU4. Indeed, the crux of the argument presented by the United States and certain other defendants, including Wolfe himself, was that too much uncertainty existed regarding PCB loadings and the transport of PCBs in the river system to render reliable estimates of such contributions.

As such, it is inaccurate to imply that "[e]vidence submitted by NCR's adversary [Georgia-Pacific, which hired Dr. Wolfe] set an outer limit of how much contamination can be attributed to NCR." Dkt. 1000 at 12. No other entity provided an estimate of NCR's share, because the burden was not on them to do so. Moreover, reviewing the trial testimony, it is clear that Wolfe's figures were not the "high end" estimate for NCR. For example, although Wolfe credited the OU1 Parties as the source of a "significant percentage" of the PCB load from upstream into "OU4A" (Tr. 2266 (Wolfe)),[8] the OU1 Parties themselves argued that they made no contribution to the PCB concentrations in OU4. Thus, believing themselves to be a "zero-share" and not a significant percentage, the OU1 Parties' estimate of NCR's contribution to

[8] At one point in the proceedings, NCR's counsel stated his belief that Wolfe's model and results credited the OU1 Parties as the source of 26% of the PCBs in "OU4A," but Wolfe testified that he could only recall "generally the results" and not the specific percentages. Tr. 2266 (Wolfe).

"OU4A" would be significantly higher than even Wolfe's, as they would transfer Wolfe's share for the OU1 Parties to NCR instead.

Wolfe's PCB mass contribution estimates are unreliable because they were generated using unreliable inputs and a suspect model. The mere fact that he said they constituted his "best effort" does not render them reliable – a point Wolfe himself recognized. Sometimes "best efforts" are just not good enough. Likewise, his being adverse to NCR does not absolve his effort of the numerous uncertainties. Wolfe's estimates are insufficiently reliable to form the basis for a divisibility determination or Butler's apportionment effort.

**2. The Court erred in finding that NCR showed "the extent to which it contributed to PCB concentrations in OU4."**

While stating that "the harm would be theoretically capable of apportionment if NCR could show the extent to which it contributed to PCB concentrations in OU4," the Seventh Circuit provided no additional guidance as to the scope of that burden. *See Glatfelter*, 768 F.3d at 678. The Court's recent decision seems to reflect a belief that broad average PCB contribution percentage estimates for "OU4A" and "OU4B" alone would be sufficient to satisfy this standard, without the need for application of more geographically-specific percentages to actual sample core concentrations. The United States respectfully disagrees and reiterates the concerns it raised regarding the blanket application of such percentages in one of its earlier briefs. *See* Dkt. 980 at 18-21. NCR's blanket application of single, area-wide contribution estimates to hundreds of specific sample locations within broad swaths of the river produced known inaccuracies, as there is no dispute that individual PRP's PCB contributions varied within the large portions of the river that Wolfe called "OU4A" and "OU4B." Moreover, there is simply no basis in the record for concluding that "an understatement in one portion of the river would be balanced out by overstatements elsewhere" (Dkt. 1000 at 10), especially in light of the way Butler ultimately used the numbers.

Regardless of the continuing importance of Butler's application of a single PCB contribution percentages to each sample location within "OU4A" and "OU4B" for purposes of determining whether the harm is theoretically capable of apportionment, this approach had untenable implications for Butler's remedy-based apportionment, as discussed in detail below.

### B. The Court Erred in Finding a Reasonable Basis to Apportion NCR a "28 Percent Share" of the OU4 Remediation Costs.

The Seventh Circuit said "we think a reasonable basis for apportionment could be found in the remediation costs necessitated by each party." *Glatfelter*, 768 F.3d at 678. The court of appeals recognized that Butler used at least some of Wolfe's mass percentage estimates as initial inputs for Butler's own multi-step analysis that generated a proposed cost apportionment for NCR, but the Seventh Circuit clearly left open whether "Butler's use of those estimates was unsound." *Id.* The trial record and our prior submissions to this Court demonstrate that Butler's use of Wolfe's estimates was unsound and could not yield a reasonable basis for apportionment reflecting the remediation costs necessitated by NCR, due to severe problems with several steps in Butler's assessment. Recall that Butler derived his "divisible share" percentages through five sequential and inter-related steps described in this summary table submitted by NCR:

Butler's analysis included five steps, as described below in Table 1.

**Table 1: Butler's Divisibility Approach**[3]

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|---|---|
| **Step 1** | Use expert estimates to identify each party's volumetric PCB contributions to OU4. |
| **Step 2** | Estimate the PCB concentrations for each party throughout OU4 using the Government's core sample database. |
| **Step 3** | Determine each party's stand-alone work remedy using the Government's Remedial Decision Rules. |
| **Step 4** | Estimate the corresponding stand-alone cost for each party's work remedy. |
| **Step 5** | Apply the stand-alone cost ratio method to determine each party's divisible share.[4] |

Dkt. 973 at 10. Because each step builds on the prior step, an error at any stage would be carried through (and likely compounded) at a later step in Butler's assessment.

The Court's recent decision overlooks a number of the problems with Butler's approach and outcome, perhaps because the decision focuses only on "the fifth step of Butler's analysis" (Dkt. 1000 at 13) and because it reflects an apparent misconception that "no one has objected to the use, in general, of a stand-alone cost method for apportionment" (Dkt. 1000 at 17).[9] Here we identify a number of problems that the Court's recent decision seemed to overlook in accepting Butler's "28 percent share" assessment.

**1. The trial record contains no substantive support or foundation for Butler's "28 percent share" conclusion, although it suggests that Butler found NCR alone necessitated a $435 million cleanup remedy**

Butler's brief testimony about his use of Wolfe's PCB mass percentage estimates offered his "28 percent share" conclusion for NCR without any supporting information about the facts and figures that Butler used to compute that percentage. Although Butler showed at least some of his math for his earlier "share" assessments that relied entirely or partly on Simon's PCB mass contribution estimates, Butler disclosed none of the figures he used when he tried to rely mainly on Wolfe's estimates, as shown below. That cannot pass muster. *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"). As best we can tell from back-calculations, Butler seems to have concluded that NCR necessitated a remedy costing *about $435 million*, or *more than 69 percent of the $629 million total remedy cost estimated by NCR*. The Seventh Circuit suggested that "a reasonable basis for apportionment could be found in the remediation costs necessitated by each party," *Glatfelter*, 768 F.3d at 678. That remand

[9] In this brief and in the United States' prior submissions, we have exposed substantial problems with each step Butler took in his five step approach for devising "divisible shares." *See*, e.g., Dkt 738 at 26, 30-35, 44-47; Dkt. 756 at 21-42; Dkt. 936; Dkt. 980.

guidance cannot be read as supporting a "28 percent cost share apportionment" for a party that necessitated *more than 69 percent of the remedy costs on its own*.

From his first expert report in September 2012 through the close of trial, Butler's ultimate opinion was that NCR deserved a "20 percent divisible share" based on the multi-step analysis he performed using PCB mass contribution estimates that he took from Simon. TX 4014 at 32; Tr. 1438. Butler used Simon's location-specific PCB contribution percentages from different parties, multiplied those percentages by the PCB concentrations found in nearby sediment core locations, predicted the "stand-alone remedies" that would be required for the resulting pattern of contamination, estimated the associated "stand-alone costs" of those remedies, and added those costs and devised ratios to compute PRP "share" percentages. The key cost estimates and percentages were presented in Butler's September 2012 expert report, as follows:

September 2012 Butler Analysis

| | Stand-Alone Remedy Cost (millions) | "Share" |
|---|---|---|
| NCR (Simon) | **$350** | **20.0%** |
| Glatfelter (Simon) | $392 | 22.4% |
| GP (Simon) | $338 | 19.3% |
| Menasha (Simon) | $328 | 18.7% |
| Other PRPs (Simon) | $342 | 19.5% |
| Total | $1,750 | |

TX 4014 at 32. In addition to providing all the "stand-alone remedy" cost numbers used to derive his Simon-based "share" percentages, Butler provided and presented maps depicting the "stand alone remedies" that he predicted for the PRPs under this scenario. TX 4014 at 36-44; TX 3056 at 9-17.

In a subsequent report served on the eve of trial in late November 2012, Butler fudged his approach slightly to generate a second scenario using: (i) PCB mass contribution estimates for NCR that were partly borrowed from Wolfe (27% for "OU4B") and partly taken from Simon

(37% "for "OU4A"); and (ii) PCB mass contribution estimates for all other parties that were still taken entirely from Simon. Under that scenario, Butler projected the cost of an NCR-only remedy at $429 million. That hybrid Wolfe/Simon approach yielded a 23.5% NCR "share" figure that was calculated from corresponding stand-alone remedy cost estimates for NCR and the other parties presented in Butler's September 2012 and November 2012 expert reports, as follows:

November 2012 Butler Analysis

| | Stand-Alone Remedy Cost (millions) | "Share" |
|---|---|---|
| NCR (Wolfe and Simon) | **$429** | **23.5%** |
| Glatfelter (Simon) | $392 | 21.4% |
| GP (Simon) | $338 | 18.5% |
| Menasha (Simon) | $328 | 17.9% |
| Other PRPs (Simon) | $342 | 18.7% |
| Total | $1,829 | |

TX 4014 at 32; TX 3056 at 6-8.[10] The "stand-alone remedies" for the other parties would not have changed under this approach (because they were still based on Simon's estimates), but Butler never provided any depiction or description of the new "stand-alone remedy" that he predicted for NCR under this scenario. TX 3056 at 9-17

After Wolfe's 43% "OU4A" PCB mass contribution estimate for NCR was disclosed mid-way through trial, Butler appears to have re-done his calculations in two different ways that he referenced in his brief surrebuttal testimony on December 19, 2012.

[10] This analysis suffered from one obvious problem because it utilized separate percentages from Wolfe and Simon: the PCB mass contribution percentages would have added up to more than 100% when Butler upped NCR's assumed PCB contribution percentages without decreasing any of the other parties' contribution percentages. That error would have been carried through this entire "share" assessment because the requirements and costs of the other parties' "stand-alone remedies" would have been overstated, which would drive *down* the final percentage "share" Butler computed for NCR. That fundamental error by Butler was similar to an error that Mr. Braithwaite made in devising his "lowball assumptions about PCB discharges" by NCR. Dkt. 1000 at 8; *see* Dkt. 738 at 38.

First, much as he had done in his November 2012 report, Butler apparently used a combination of mass contribution estimates from Wolfe (for NCR) and mass contribution estimates from Simon (for all other dischargers). Butler said that increasing NCR's "OU4A" contribution from 37% to 43% made his calculated percentage for NCR go "up by 0.2 percent" as compared to his November 2012 figure – *i.e.*, "from 23.5 to 23.7 percent." Tr. 2785. Assuming he employed the same approach that he used in November 2012, that 23.7% figure would have been calculated from corresponding "stand-alone remedy" cost estimates for NCR and the other parties. If he was still using the same Simon inputs for the other parties, Butler's "stand-alone remedy" cost estimates for the other parties yet again would have been the same as those presented in his September 2012 expert report. Although never disclosed by Butler, his "stand-alone remedy" cost estimate for NCR under that scenario can be back-calculated from the other figures as about $435 million. Thus, we believe that the cost estimates Butler used to compute NCR's "share" under this scenario can be divined from Butler's reports and his brief testimony, as follows:

December 19, 2012 Butler Analysis #1

| | Stand-Alone Remedy Cost (millions) | "Share" |
|---|---|---|
| NCR (Wolfe) | **$435** [11] | **23.7%** |
| Glatfelter (Simon) | $392 | 21.4% |
| GP (Simon) | $338 | 18.4% |
| Menasha (Simon) | $328 | 17.9% |
| Other PRPs (Simon) | $342 | 18.6% |
| Total | $1,835 | |

TX 4014 at 32; Tr. 2785.[12] Once again, the projected "stand-alone remedies" for the other parties would have been those depicted in the maps provided by Butler (if they were still based

[11] As noted above, we believe this $435 million "stand-alone remedy" cost for NCR can be back-calculated by simple arithmetic from the 23.7% figure reported by Butler and the "stand-alone remedy" costs for the other parties given in Butler's September 2012 report.

on Simon's estimates), but Butler never provided any depiction or description of the "stand-alone remedy" that he predicted for NCR under this scenario.

Second – and most important for present purposes – Butler appears to have done a completely new and different set of analyses for a final assessment that yielded his "28 percent share" assessment for NCR. Although his explanation was very sketchy, Butler implied that while the trial was in progress he re-ran his entire multi-step model using Wolfe's mass contribution estimates from *all* the parties located in OU1, OU2, "OU4A," and "OU4B."[13] We do not know how Butler did that for all of OU4, because Wolfe only confirmed: (i) his estimate that the "OU2 Parties" contributed 43% of the PCB mass to "OU4A" (when he testified at trial on December 17, 2012, Tr. 2266); and (ii) his estimates of various parties' contributions to "OU4B" (as set forth in a table in his expert report, TX 2206 at FOXEXPT004725). As noted above, *Wolfe never offered evidence of any estimated PCB contribution percentages to "OU4A" from the PRPs that he termed the "OU1 Parties" or the "OU4A Parties."*[14] We do not know whether Butler borrowed data from Simon or whether he used other estimates or assumptions to fill those information gaps. About all we know about Butler's behind-the-scenes work is that it somehow yielded a "28 percent share" for NCR, presumably based in part on a $435 million "stand-alone remedy" cost estimate for NCR. But the trial record contains *none* of the other figures that were needed to derive NCR's "share" percentage, such as the "OU4A" PCB mass

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[12] This iteration of Butler's analysis also incorporated the error described above in footnote 10, but the error would have been magnified when Butler once again upped NCR's OU4A contribution percentage from 36% to 43% without decreasing any of the other parties' contribution percentages.

[13] *See* Tr. 2786 (Butler indicating that he made an effort "to estimate NCR's divisible share of the OU4 remediation cost using Dr. Wolfe's OU4 estimates of PCB mass for all of the different groups that he used").

[14] Wolfe testified that there was virtually no transport form the "OU4B Parties" upstream, so their contribution to "OU4A" was zero. Tr. 2266.

contributions percentages that Butler assumed for the other parties and the "stand-alone remedy" cost estimates that he somehow made for the other parties, as summarized here:

December 19, 2012 Butler Analysis #2

| | PCB Mass Percentage Contribution Estimates from Wolfe | Butler Stand-Alone Remedy Cost (millions) | Butler "Share" |
|---|---|---|---|
| NCR (Wolfe) | OU4A – 43%<br>OU4B – 27% | **$435** | **28%** |
| OU1 Parties (Wolfe?) | OU4A – **??%**<br>OU4B – 17% | **$??** | **??%** |
| OU4A Parties (Wolfe?) | OU4A – **??%**<br>OU4B – 21% | **$??** | **??%** |
| OU4B Parties (Wolfe?) | OUA – 0%<br>OU4B – 35% | **$??** | **??%** |

In addition to lacking key inputs that Butler used for his new analysis and key outputs that he used to compute his "28 percent share" figure, the trial record is devoid of evidence about the interim steps Butler took in this new and different version of his assessment. For example, Butler must have devised entirely new "stand-alone remedy" projections with inputs that he borrowed from Wolfe, but NCR never provided or presented any depictions of those remedy projections, as it had for Butler's earlier estimates based on Simon's percentages. Because Butler re-did his entire analysis for all of the parties and gave his "28 percent share" conclusion without any substantive backup, the trial record contains no foundation for the "share" opinion that Butler offered (over strenuous objections) on the last day of trial.

The Court should reconsider and reverse its May 15 decision for these reasons alone. But even setting aside these insurmountable problems with the "28 percent share" opinion that Butler offered, the record documents multiple flaws in Butler's five-step "apportionment

method." In essence, his method could *never* produce a reasonable basis for apportionment – at least for OU4 of the Fox River Site – as shown in the next subsections.

**2. Steps 1 and 2 of Butler's assessment yielded no useful apportionment inputs.**

Even if Steps 1 and 2 of Butler's method identified a theoretical basis for apportionment (which we do not concede, for the reasons outlined above), the information that Butler generated and used as inputs for Step 3 could not a produce a reasonable apportionment of OU4 costs under Butler's method.

First, the trial record shows that Wolfe's PCB mass contribution percentages were rough "ballpark" figures surrounded by substantial uncertainties, as discussed above.

We will not go over that again here, although we add one point of particular relevance to the apportionment analysis. Rough volumetric estimates may suffice for an equitable *allocation* among jointly and severally liable parties, but a higher level of precision is required for an *apportionment* that allows a party to escape joint and several liability. On one hand, Congress has *required* courts "to allocate response costs among liable parties using such equitable factors as the court determines are appropriate," even if the available information is sketchy and highly uncertain. 42 U.S.C. § 9613(f)(1). On the other hand, "CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists" and "apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614, 615 n.9 (2009). With all due respect, we think the Court got it backwards when it suggested that uncertainties about the contributions to the harm should not preclude an apportionment because they were "uncertainties that essentially go with the territory" and "uncertainties . . . that would bedevil the divisibility question in *any* river with multiple PRPs and an imperfect historical record." Dkt. 1000 at 7, 8. As emphasized by one of the leading

court of appeals cases that the Supreme Court cited with approval in *Burlington Northern*, "where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty" through the imposition of joint and several liability. *O'Neil v. Picillo*, 883 F. 2d 176, 179 (1st Cir. 1989). Because uncertainties often make it difficult to determine the contribution of each cause to the harm in a CERCLA case, divisibility and apportionment should remain "a rare scenario." *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 n.3 (7th Cir. 2007). The "ballpark" PCB mass contribution estimates that Butler took from Wolfe in Step 1 of his assessment could not provide a reliable foundation for an apportionment of costs.

Second, Butler obtained no reliable information about parties' relative contributions to the PCB concentrations in specific locations when he multiplied area-wide PCB mass percentages times PCB concentrations found at particular core locations in Step 2 of his assessment.

The Court seemed to accept that fact in its recent decision, but then discounted it. Even if the Court was right in thinking that a *theoretical divisibility* finding "no longer requires (if it ever did) the 'precise' polygon-by-polygon approach that was used by NCR," (Dkt. 1000 at 10-11), the fact remains that Butler actually employed a location-specific approach in his "apportionment method" that yielded a "28 percent share" for NCR. The Court correctly recognized that Butler's Step 2 would under-estimate NCR's contributions to the PCB concentrations in some areas within OU4 and over-estimate its contributions in other areas, even if Wolfe's area-wide estimates were spot on. Dkt. 1000 at 9-10. But the Court erred in assuming that "an understatement in one portion of the river would have to be balanced by overstatements elsewhere." *Id.* There is no record evidence that the errors would balance, and there is no reason

to believe they would balance out in light of the way Butler devised and used the location-specific concentrations that he calculated. In fact, the evidence and an illustrative example discussed in our prior submissions (*see, e.g.*, Dkt. 980 at 18-21; Dkt. 980-1) showed that Step 2 of Butler's method would yield misinformation when applied to highly-variable data at about 1,600 core sample locations and would lead to demonstrably incorrect conclusions when carried through to Steps 3 and 4 of his assessment, as discussed next.

**3. Steps 3 and 4 of Butler's assessment generated unreliable "stand-alone remedy" projections and unreliable "stand-alone remedy" cost estimates.**

In Step 3 of his apportionment assessment, Butler projected remedies that might be required for OU4 based on the location-specific PCB concentration contributions that he calculated in Step 2. In Step 4 he estimated the costs of those projected remedies. There were several problems with his approach.

As shown above, all or nearly all of Butler's calculated PCB concentration contributions would have been wrong – not only for NCR, but also for the other PRPs – so his resulting remedy projections and associated cost estimates would have been completely invalid.

We choose our language carefully in saying that Butler's "stand-alone remedy" projections and costs estimates *would have been* completely invalid. We have never seen anything depicting or describing any of the remedy projections that generated Butler's "28 percent share" assignment for NCR and the trial record contains none of the cost estimates, as discussed above. In any event, it is clear that the remedy depictions would have been very odd, and almost certainly indefensible, at least partly because they would have been devised using an artificial distinction drawn between the portions of OU4 that Dr. Wolfe and some others called "OU4A" and "OU4B." We understand why Wolfe drew an artificial distinction between "OU4A" and "OU4B" for a 2007 settlement mediation and why he presented estimates only for "OU4B" in his report in this case. He was hired by Georgia-Pacific and his client has always

contended that it should only be required to pay a share of the remediation costs for "OU4B." But Wolfe's subdivision of OU4 would have yielded particularly dubious results for the other parties that discharged upstream from Georgia-Pacific and it would have limited the "error-balancing" that the Court theorized.

The Court's recent decision seems to posit that Butler's method would overestimate NCR's responsibility for an aggressive remedy in some areas (such as near Georgia-Pacific's facility) and underestimate NCR's responsibility for an aggressive remedy in other areas (such as in areas near the De Pere Dam). Dkt. 1000 at 9, 14. We agree. But those errors in Steps 3 and 4 of Butler's assessment would not have "balanced out" or otherwise eliminated the problems with Butler's overall approach, as the Court seemed to believe. Dkt. 1000 at 9-10, 14. For example, the errors in Butler's method would have greatly underestimated NCR's responsibility for the costly remediation of highly-concentrated, TSCA-level PCB contamination near the old turning basin just below the De Pere Dam. Dkt. 1000 at 9; Tr. 319-23 (Fox); Tr. 2316-20 (Merrill). U.S. Paper would have been the main party saddled with the consequences of that error under Butler's area-wide approach for "OU4A." That misattribution stands in direct conflict with the evidence offered at trial showing that U.S. Paper probably made no material contribution to the mess in that area. Tr. 319-23 (Fox); Tr. 2316-20 (Merrill).

One cannot say that this over-attribution to U.S. Paper in "OU4A" was balanced out by an under-attribution to Georgia-Pacific near its facility in "OU4B," for at least two reasons: (i) an erroneous credit to Georgia-Pacific would not offset an erroneous debit to U.S. Paper; and (ii) Butler used separate area-wide percentages for "OU4A" and "OU4B," so an "averaging error" in "OU4A" could not even theoretically "balance out" a separate error in "OU4B." Moreover, there is no reason to believe that Butler's method would have generated any meaningful offset for this over-attribution to U.S. Paper. As shown in the trial record, much of

the PCB contamination right near the U.S. Paper facility was remediated under a 2006 Consent Decree (Dkt 276-17; Tr. 282-83 (Fox)), so the costs of that work were not even included in the UAO costs that Butler claimed to be "apportioning" in his assessment.[15]

Even setting aside the problems with his calculated contributions to the PCB concentrations, Butler's "stand-alone remedy" projections were speculative and his "stand-alone cost" estimates were flawed. Our prior submissions showed that the "remedy decision rules" that Butler purported to apply would allow a wide range of remedy design outcomes (leaving substantial room for bias in Butler's choice of a hypothetical "stand-alone remedy" for each party). Our prior submissions also showed that Butler based Steps 3 and 4 of his assessment on a superseded remedial design plan and incorrect remedy cost figures. Dkt 738 at 34-35; Dkt. 756 at 24-27; Dkt. 980 at 22-24.[16] For all of those reasons, Butler simply could not have generated reasonable and reliable "stand-alone remedy" projections or "stand-alone cost" estimates for NCR and the other PRPs.

**4. Step 5 of Butler's assessment generated "share" percentages that were meaningless and analytically indefensible.**

All of the errors and problems in Steps 1 through 4 of Butler's assessment would have been compounded in Step 5 – they all would have influenced the "28 percent share" that Butler calculated for NCR. That is because under the "stand-alone cost ratio method" that Butler employed, NCR's ultimate "share" calculation depends on the inputs, projections, and estimates

[15] In a similar vein, Butler's assessment did not even consider costs spent years ago in remediating an area known as Sediment Management Unit 56/57 near Georgia-Pacific's discharge point in "OU4B." Dkt. 507-10.

[16] NCR's only rejoinder was that Butler did the best he could with the information he possessed because he performed most of his analysis before better information became available. Even if that was true, it wouldn't overcome the fact that subsequent developments proved that Butler's work was based on incorrect information and generated unreliable predictions.

that Butler used for *all the parties*, not just the inputs, projections, and estimates that Butler used for NCR.

Assuming he employed his "stand-alone cost ratio method," and assuming he somehow derived "stand-alone cost" estimates for NCR and the other parties using at least some PCB mass contribution estimates borrowed from Wolfe, we believe Butler would have computed NCR's "28 percent share" as follows:

$$\frac{\text{(Stand-Alone Cost ("SAC") for NCR)}^{17}}{\text{(SAC for OU1 Parties) + (SAC for OU4A Parties) + (SAC for OU4B Parties)}} = 28 \text{ percent}$$

As emphasized earlier, the trial record contains none of the stand-alone cost estimates that Butler would have used in the denominator of that equation, so his assessment cannot be checked, replicated, or validated. But the formula alone shows that Butler's "28 percent share" assignment to NCR would not have been correct if any errors in Steps 1 through 4 of his analysis had infected Butler's "stand-alone cost" estimates for NCR, for the "OU1 Parties," for the "OU4A Parties," *and/or* for the "OU4B Parties." We know that major errors and uncertainties would have infected all of those estimates, as shown above, so Butler would have obtained an entirely unreliable "share" answer when he divided one unreliable number into the sum of several other unreliable numbers.

Even if most of the other problems are ignored, Butler's overall approach does not support a 28% apportionment for NCR. As shown above, if NCR contributed about 43% of the PCBs in "OU4A" and about 27% of the PCBs in "OU4B," then Butler's own assessment demonstrated that NCR necessitated a remedy costing *about $435 million*, or *more than 69% of*

[17] If Butler used a "stand-alone cost" for the "OU2 Parties" rather than for NCR alone, then it also would have included a contribution from CBC Coating. CBC's contribution would have been trivial compared to NCR's, however, for reasons outlined in the trial record and in prior submissions in this case. *See, e.g.*, Dkt. 961 at 2 (the Court noting that "CBC Coating was a small-scale recycler, and the evidence is conflicting about to whether it even recycled broke before NCR stopped using PCBs in its carbonless paper.").

*the $629 million total remedy cost estimated by NCR*. In Step 5 of his assessment, Butler's "stand-alone cost ratio method" drove NCR's calculated "cost share" *way down* from 69 percent to 28 percent through a set of counterfactual assumptions acknowledged by this Court.

> This approach assumes that the pollution is cleaned up in a joint project among several polluters, whose combined efforts produce costs savings. . . . Thus, under this approach, each polluter shares the benefits of group cost savings in proportion to its own stand-alone costs.

Dkt. 1000 at 14. As noted in a prior submission, this is basically a cost-spreading approach that gives the biggest breaks to those who caused the most costs. *See* Dkt. 756 at 26-27. That may be a perfectly fair way to *allocate* costs among jointly and severally liable parties performing a joint cleanup, but the method's underpinnings are fundamentally at odds with the potential consequences of *apportioning* one or more parties a distinct *several share*, as pointed out in a number of our prior submissions. *See* Dkt. 738 at 44; Dkt. 756 at 26; Dkt. 936 at 7; Dkt. 980 at 22. If NCR can seek and obtain a ruling that it can *avoid* joint and several liability for OU4, then NCR will practically ensure that assumed efficiencies and group cost savings of a joint project will not be realized. NCR has argued that an apportionment carving out an NCR-only "divisible share" for OU4 would grant NCR a right to step away from the OU4 cleanup project;[18] that would almost certainly mean that the future costs of the overall project would be driven up by NCR's unilateral action. NCR should not be allowed to claim the benefits of a "joint action" that are assumed in computing its "share" today while demanding a right to squander those benefits after its "share" has been fixed. The "stand-alone costs ratio method" is not a reasonable or appropriate method for *apportioning several shares* under CERCLA.

In the final analysis, the Court's recent decision does not even seem to endorse Butler's complex, multi-step apportionment method. The decision simply seems to accept Butler's

[18] Since the Seventh Circuit's remand, NCR has made clear that it intends to rely on this court's earlier statement that "if NCR succeeds in proving its divisibility defense, the government can no longer require NCR to keep funding the remediation." Dkt. 973 at 32 (quoting *NCR*, 960 F. Supp. 2d at 798).

"28 percent share" assignment to NCR "as solidly in the center of the range of reasonableness" because "if NCR contributed to 27-43% of the harm in OU4, it also contributed roughly the same amount to the cleanup costs." Dkt. 1000 at 15, 16. When the Court reached that conclusion, we respectfully submit that the Court seriously misapprehended the Seventh Circuit's guidance and the record evidence about the relationship between the harm and the costs at this Site. We do not believe that the Seventh Circuit did find (or could have found) "that not only was the harm continuous, but the cleanup costs were continuous as well," as stated by this Court. Dkt. 1000 at 14. What the Seventh Circuit said was:

> The cost of the remedial approach in a particular area is *positively correlated* with the level of contamination near the surface of that area, which contributes to the operable unit's SWAC, and consequently, the harm.

*Glatfelter*, 768 F.3d 678 (emphasis added).[19] "A positive correlation indicates that the values on two variables being analyzed move in the same direction." T.C. Urdan, Statistics in Plain English at 89 (2d ed. 2005). The court of appeals noted an undisputed *directional* relationship between the degree of contamination and the costs at this Site: generally speaking, the remediation costs increase with the degree of contamination.

But the Seventh Circuit did *not* decide or even imply that there is a *continuous*, *linear*, *or proportional* relationship between the degree of contamination and the associated remediation costs at this Site. Indeed, all the evidence disproves that. Butler admitted that the relationship between the degree of contamination and the remedy costs was "complex" and "not linear." Tr. 1428, 1471, 1509 (Butler). One of our experts, Mr. Fox, identified a wide range of variables that actually influence sediment remediation costs at this Site, some of which are PCB content-dependent and some of which are not. Tr. 289-94 (Fox). Because the degree of contamination

[19] The Seventh Circuit's focus on "the cost of the remedial approach *in a particular area*" is noteworthy and underscores why Butler's above-described errors in his location-specific remedy and cost projections were fatal flaws in his overall assessment.

and the costs are not related in a *continuous, linear, or proportional* manner, there is no support for the Court's assumption that "if NCR contributed 27-43% of the harm in OU4, it also contributed roughly the same amount to the cleanup costs." Dkt 1000 at 15. In fact, as shown above, by Butler's assessment, if it is assumed that NCR contributed 27 percent of the contamination in "OU4B" and 43% of the contamination in "OU4A," then NCR could have necessitated a OU4 remedy costing $435 million, or more than 69 percent of the total OU4 remedy cost estimated by NCR. Because the costs do not increase in a proportional manner as the degree of contamination increases, Butler's method is not validated in any way – as the Court seems to suggest – because it yielded a "28 percent share" that happened to fall "within the range" between the 43 percent PCB mass contribution estimate that Wolfe made for NCR in "OU4A" and the 27 percent estimate that he made for NCR in "OU4B."[20] The Court should reconsider and reverse its May 15 decision because the information that Butler actually used and the method that Butler actually employed yielded an unreliable, unverifiable, inappropriate, and meaningless "divisible share" percentage.

**C. The Court Should Decline to Enter the Judgment Proposed By NCR**

As shown above and in our prior submissions, the Court should reject NCR's proposed judgment mainly because the record made at trial supports a joint and several liability judgment against NCR and in favor of the United States. But the Court should reject NCR's proposed judgment even if the Court does not go that far, for the reasons identified here.

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[20] There is a positive correlation between the *number of coins* placed in the jar and the *amount of money* in the jar: as the number of coins increases, the amount of money increases. If one donor placed 10% of the *coins* in a change donation jar in week one and 20% of the *coins* in week two, it would *not* be reasonable to assume that he placed "about 15%" of the *total money* in the jar over the two weeks. Not all coins have the same value. Unless everyone is donating coins of the same denomination, there will not be a proportionate relationship between the *number of coins* donated and the *amount of money* donated, so that 15% guess cannot be validated by pointing out that 15% (of the total money) falls solidly in the center of the range between 10% and 20% (of the number of coins). To make a reasonable assessment, one would need to know the number of pennies, nickels, dimes, quarters, and other coins added to the jar by our donor of interest and the other donors.

The claim that was tried in December 2012 was the United States' Fifth Claim for Relief for enforcement of EPA's UAO requiring performance of remediation work in OUs 2-5. The relationship between the United States' UAO enforcement claim and NCR's proposed judgment for a "28 percent share" is entirely unclear. In this case and in nearly any other case, it would have been impossible for EPA to predict (and judge) the apportionment theories that PRPs might raise and then tailor a cleanup order to separate out and match-up PRP responsibilities with potentially successful apportionment theories. As pointed out in our prior submissions, the Seventh Circuit has said that type of UAO tailoring is not required and may not always be sensible, because EPA should be allowed to craft its orders to encourage and indeed require efficiencies of joint action. As Judge Posner explained in a case that involved another UAO:

> The alternative – each polluter at a site just removing the contaminants for which he is responsible – may be inefficient, for the polluters may stumble over each other trying to remove separate pollutants. The pollutants may have been deposited in the same spot by successive waves of polluters, in which case multiple removals would greatly increase total costs. Suppose two passengers in an elevator accidentally drop their keys in the space between the door of the elevator and the door of one of the floors, and the building management instructs one of its employees to go to the bottom of the elevator shaft to retrieve them. Would it make sense for the employee to make two separate trips for the two sets of keys? This is just an analogy, and analogies can lead judges astray. But our only point is that the EPA's desire to have one polluter clean up the entire site is not so flagrantly unreasonable as to entitle the polluter to disregard an order embodying that desire on the ground that the order is so plainly beyond the agency's power that it should be treated as a nullity.

*Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 665 (7th Cir. 1995). In light of this, we do not understand how NCR's proposed judgment resolves the United States Fifth Claim for Relief for enforcement of the UAO against NCR. Although we do not think it can be justified for reasons laid out in our prior submissions (*see* Dkt. 980 at 23-24), if NCR and the Court intend the judgment to serve as a declaration that NCR has paid its share and can now disregard the UAO as it relates to OU4, then the judgment should make that clear. Alternatively, if the judgment is meant to apply only in a prospective manner to apportion responsibility for future

OU4 remediation costs as they come due (presumably 28 percent to NCR and the remainder to Glatfelter and Georgia-Pacific, jointly and severally), then that should be made clear.

NCR's proposed judgment that "there is a reasonable basis to apportion [NCR's ] share of the remediation costs of OU4 at 28%" and that "NCR has no liability for OU4 remediation costs beyond its 28% divisible share" could resolve very little and instead spawn new waves of litigation. Although Butler only claimed that he was trying to apportion *some* UAO costs associated with OU4, the language of the proposed judgment could invite fights over what costs belong in the numerator and what costs belong in the denominator for any 28 percent calculation.[21] We suspect NCR also might pick new fights over how and from whom it can recover claimed "overpayments" if it is awarded a judgment that it "has no liability for OU4 remediation costs beyond its 28% divisible share." We cannot predict whether the new rounds of litigation would be spawned in this case, in the *Whiting* case, or in both cases.

In addition to these overarching concerns, there are several other particular problems with NCR's proposed judgment.

First, although the Court's recent decision makes a reference to OU1 at the end, EPA's UAO and the United States' Fifth Claim for Relief did not even address OU1, and arguments for and against PRPs' joint and several liability for OU1 were not put before the Court in the December 2012 trial. A judgment on this claim should not include a determination that "NCR discharged no PCBs in OU1, and therefore NCR has no divisible share of the clean-up costs for that area," as proposed by NCR.

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[21] What about the substantial cost of building the sediment processing plant that has been used for much of the UAO work in OUs 2, 3, and 4, and the costs of designing the overall remedy for OUs 2-5? What about OU4 remediation costs that Butler never even considered, such as the expenditures years ago for dredging in the Phase 1 project area near the U.S. Paper facility and for dredging Sediment Management Unit 56/57 near the Georgia-Pacific facility? What about cap monitoring and maintenance costs for OU4 that may not be incurred until years from now?

Second, the proposed judgment should not be entered against the State of Wisconsin – as proposed by NCR – because the Fifth Claim for Relief was only asserted by the United States. Only the United States can issue orders such as the UAO that require performance of remedial action under CERCLA Section 106. For that reason, the United States moved for entry of judgment in its favor after the remand without Wisconsin joining the motion. Dkt. 935. The judgment also should not mis-describe that motion as "Plaintiffs' motion," as done in NCR's proposed form of judgment.

Third, any judgment should clarify that it does not address or limit Plaintiffs' other unresolved claims in this case, namely: (i) the yet-unlitigated claims of the United States and the State of Wisconsin for recovery of their own costs from NCR under CERCLA Sections 107 and 113(g)(2) (as alleged in the First through Fourth Claims for Relief in their First Amended Complaint, Dkt. 30 at 29-30); or (ii) the United States' proposed claims against NCR for contribution toward costs that Appvion is now seeking to recover from the United States (as alleged in the United States' proposed Supplemental Complaint, Dkt. 989-2).

* * *

For these reasons, the United States respectfully requests that the Court reconsider and reverse its May 15, 2015 decision. In any event, the Court should reject the form of judgment proposed by NCR and enter an alternate judgment that accords with the points made in this brief.

Respectfully submitted,

For the United States of America

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Dated: May 29, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this day, the foregoing Brief was filed electronically with the Clerk of the Court using the Court's Electronic Case Filing System, which sent notification of such filing to all counsel of record through the ECF notification system.

Dated: May 29, 2015 s/ *Randall M. Stone*